

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of the State Independent Alliance and the	)	WT Docket No. 00-239
Independent Telecommunications Group for a	)	DA 02-2266
Declaratory Ruling that the Basic Universal	)	
Offering Provided by Western Wireless in	)	
Kansas is Subject to Regulation as Local Exchange	)	
Service	)	

To:     Wireless Telecommunications Bureau  
          Policy and Rules Branch, Commercial Wireless Division

**OPPOSITION OF AT&T WIRELESS SERVICES, INC.  
TO PETITION FOR RECONSIDERATION AND CLARIFICATION**

Pursuant to the Commission's Public Notice,<sup>1/</sup> AT&T Wireless Services, Inc. ("AWS") hereby submits its opposition to the Petition for Reconsideration and Clarification filed by the State Independent Alliance and the Independent Telecommunications Group (collectively, the "Independents")<sup>2/</sup> of the Commission's order in the above-captioned proceeding.<sup>3/</sup>

**INTRODUCTION AND SUMMARY**

The Independents' Petition should be denied. Under the guise of seeking "clarification" of the Commission's decision, the Independents ask the Commission to find that states may

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<sup>1/</sup> Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Reconsideration and Clarification of Commission Order Regarding Western Wireless' Basic Universal Service Offering in Kansas*, WT Docket No. 00-239, DA 02-2266 (rel. Sept. 16, 2002).

<sup>2/</sup> Petition for Reconsideration and Clarification of the State Independent Alliance and the Independent Telecommunications Group, WT Docket No. 00-239 (filed Sept. 3, 2002) ("Petition").

<sup>3/</sup> See *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western*

impose an equal access requirement as a condition of obtaining eligible telecommunications carrier (“ETC”) status. Such a requirement would be contrary to both the Communications Act and the Commission’s previous rulings. Nor does so-called competitive neutrality require the imposition of such an obligation.

*First*, the Act specifically prohibits the imposition of equal access requirements on commercial mobile radio service (“CMRS”) providers. When first developing its universal service rules, the Commission declined to include equal access in the list of supported services in light of the Act’s express proscription. A state may not condition CMRS providers’ eligibility for universal service funding on compliance with an equal access requirement that it lacks the authority to impose directly.

*Second*, while the Act provides the states with authority to craft state universal service support mechanisms, it expressly prohibits states from adopting regulations that conflict with the Commission’s rules and from creating universal service obligations that burden federal universal service mechanisms. CMRS providers’ “bucket” rate plans do not differentiate between local and long distance calls and therefore do not readily lend themselves to application of an equal access requirement. Requiring these providers to offer equal access to interexchange carriers would therefore deter them from applying for and obtaining ETC status, in direct conflict with the Commission’s policy of competitive neutrality. Such a requirement would also unjustifiably expand the scope of supported services and increase the financial burden on all contributing carriers, placing at risk their ability to make their full contribution to the federal universal support mechanisms. There is no statutory or policy basis for forcing CMRS carriers to emulate the ILECs’ regulatory scheme as a condition of ETC status.

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*Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802 (2002) (“*Kansas Order*”).

The Commission should also reject the Independents' request for reconsideration of the finding that Western Wireless's Basic Universal Service ("BUS") offering is properly classified as CMRS. The Independents offer no new support for their arguments and there is no basis for the Commission to reconsider its decision. For these reasons, the Independents' Petition should be denied.

**I. STATES SHOULD NOT BE PERMITTED TO IMPOSE EQUAL ACCESS OBLIGATIONS ON CMRS PROVIDERS AS A CONDITION OF OBTAINING ETC STATUS**

In the *Kansas Order*, the Commission found that Western Wireless's BUS is appropriately classified as CMRS and that the Kansas Corporation Commission ("KCC") therefore may not impose equal access requirements on the service.<sup>4/</sup> The Independents now seek a "clarification" of this determination.<sup>5/</sup> The Commission should reject this request. Imposing an equal access requirement as a condition of obtaining ETC status is inconsistent with sections 254 and 332(c) the Act and would serve no valid policy goal. To the contrary, by deterring CMRS providers from obtaining ETC status, such a requirement would disserve the public interest in a competitively- and technology-neutral universal service program that offers the widest possible choice of service providers.

**A. Section 332 of the Act Prohibits the Imposition of Equal Access Requirements on CMRS Providers**

In adopting its universal service obligations, the Commission found that universal service mechanisms must be administered on a technology-neutral basis.<sup>6/</sup> Any telecommunications

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<sup>4/</sup> See *Kansas Order* ¶ 15 (citing 47 U.S.C. §§ 332(c)(3), 332(c)(8)).

<sup>5/</sup> Petition at 11-14.

<sup>6/</sup> See *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 145 (1997) ("*Universal Service Order*").

carrier willing and able to offer supported services may become an ETC.<sup>7/</sup> The Commission explicitly held that CMRS providers are eligible for ETC status and to receive universal service support.<sup>8/</sup> As part of its effort to implement the Act in a manner that is not “biased toward any particular technologies,” the Commission found that providing equal access to interexchange carriers should not be a condition precedent to carriers obtaining ETC status.<sup>9/</sup> The Commission declined to mandate equal access because such a requirement would be contrary to section 332(c)(8) of the Act, which specifically prohibits the imposition of any equal access requirement on CMRS providers.<sup>10/</sup> Further, the Commission found that an equal access requirement would “undercut local competition and reduce consumer choice, and thus, would undermine one of Congress’s overriding goals in adopting the 1996 Act.”<sup>11/</sup> Indeed, most CMRS carriers’ rate plans do not readily lend themselves to an equal access requirement because they do not distinguish between local and long distance calls. Such a requirement would therefore defeat attempts by most, if not all, CMRS providers to obtain ETC status, depriving customers of a service option that has proven hugely popular among the public at large.<sup>12/</sup>

For the same reasons, a state may not impose an equal access requirement as a condition of CMRS providers’ eligibility for state universal service support. State-imposed equal access

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<sup>7/</sup> See *Universal Service Order* ¶ 145.

<sup>8/</sup> See *id.*

<sup>9/</sup> See *Universal Service Order* ¶ 79.

<sup>10/</sup> 47 U.S.C. § 332(c)(8); *Universal Service Order* ¶ 78.

<sup>11/</sup> *Universal Service Order* ¶ 79.

<sup>12/</sup> See, e.g., Dan Meyer, *On-network calling plans satisfy carriers, customers; Impact on rural partners less certain*, RCR WIRELESS NEWS, June 3, 2002, at 10 (noting the “huge subscriber boost” resulting from the introduction in national rate plans); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 17 FCC Rcd 12985 (2002) (discussing the increase in wireless subscribership due to the increase of one rate plans).

obligations for CMRS providers seeking ETC status violate the prohibition on such requirements contained in section 332(c)(8). The Independents' assertion to the contrary notwithstanding,<sup>13/</sup> a state may not indirectly impose a requirement on CMRS carriers that it cannot impose directly.<sup>14/</sup> The Communications Act does not require CMRS providers to choose between universal service eligibility and insulation from equal access requirements, and nothing in the Act gives states the authority to force wireless carriers to make such a choice. The Commission should reject the Independents' request for clarification and affirm that, consistent with section 332(c)(8), states may not impose equal access requirements on CMRS providers as a condition for receiving state universal service funds.

**B. State Universal Service Requirements Cannot Be Contrary to Commission Rules or Burden Federal Universal Service Mechanisms**

The imposition of a state equal access condition on CMRS providers would also violate section 254(f) of the Act, which bars states from adopting state universal service requirements that conflict with Commission rules or burden federal universal service support mechanisms.<sup>15/</sup>

“[S]tate universal service mechanisms must be consistent and must not conflict with the federal

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<sup>13/</sup> Petition at 12.

<sup>14/</sup> See, e.g., *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 201 (D.C. Cir. 1995) (FCC may not use regulation “to accomplish indirectly what [the Communications Act] directly proscribes”), *cert. denied*, 516 U.S. 1112 (1996); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (local government may not impose a condition on a cable system transfer that it had no authority to impose directly); see also *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 14095, ¶ 70 (2002) (“Such a condition would impose a requirement on CMRS carriers if they wish to be an ETC that cannot be imposed directly”) (“*Joint Board Order*”); *id.*, Separate Statement of Commissioner Abernathy (“denying or revoking a CMRS carrier’s ETC designation for its failure to provide equal access seems tantamount to imposing a ‘requirement’ on the carrier”).

<sup>15/</sup> 47 U.S.C. § 254(f); see also *Universal Service Order* ¶ 663 (“under section 254(f), states are entitled to establish and fund their own universal service support mechanisms, not inconsistent with the Commission’s rules”).

mechanisms.”<sup>16/</sup> A state-imposed equal access requirement conflicts directly with the Commission’s rejection of such a requirement and is therefore barred by section 254(f).

An equal access condition would also “burden Federal universal service support mechanisms” in violation of the Act and the Commission’s rules.<sup>17/</sup> In 1997, the Commission found that including equal access in the list of supported services would reduce competition among universal service providers in rural and high cost areas.<sup>18/</sup> The same reasoning applies today. The vast majority of CMRS providers do not currently provide equal access to interexchange carriers. If state commissions were to require CMRS providers to offer equal access as a condition to receiving state universal service support, it would sharply reduce the number and diversity of carriers competing for customers in high cost areas and unnecessarily expand the size of the universal service fund. Neither result would advance the Commission’s and Congress’s interest in ensuring the provision of telecommunications services at affordable rates to all consumers. Indeed, as members of the Joint Board recently noted, “requiring an ETC to provide equal access may discourage or delay provision of non-wireline services in high cost rural areas” and provides both a “greater burden on the universal service fund” and “potentially higher prices of an expanded level of ‘basic’ service for all consumers.”<sup>19/</sup> Given the burden on federal universal service support mechanisms and the conflict with the Commission’s rules, state-imposed equal access requirements cannot be sustained under section 254(f).

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<sup>16/</sup> *Universal Service Order* ¶ 816.

<sup>17/</sup> 47 U.S.C. § 254(f); *Universal Service Order* ¶ 136.

<sup>18/</sup> *See Universal Service Order* ¶ 79; *Joint Board Order* ¶ 71.

<sup>19/</sup> *Joint Board Order*, Statement of Commissioner G. Nanette Thompson, Regulatory Commission of Alaska; *id.*, Statement of Commissioner Thomas J. Dunleavy, New York Public Service Commission.

### **C. Competitive Neutrality Does Not Require the Imposition of Equal Access Obligations on CMRS Providers**

Finally, competitive neutrality does not require the imposition of equal access obligations on CMRS carriers as a condition of ETC status. Because the equal access requirements for wireline carriers arose outside of the context of universal service, no carrier is currently required to provide equal access as a condition of receiving federal universal support.<sup>20/</sup> As the Commission found in 1997, the Act does not limit ETC status to only those carriers that assume the responsibilities of the ILECs.<sup>21/</sup> There is no statutory basis for requiring CMRS providers to emulate the ILECs' regulatory structure as a condition of ETC status (or for any other reason). To do so would be inconsistent with the Act's distinct treatment of CMRS and the Commission's deregulatory goals. While the creation of fair and equal ETC rules is a laudable goal, the Commission should affirm its finding in the *Universal Service Order* "that competitive neutrality does not require CMRS carriers to provide equal access merely because incumbent local exchange carriers provide it."<sup>22/</sup>

## **II. WESTERN WIRELESS'S BUS IS PROPERLY CLASSIFIED AS CMRS**

The Independents also seek reconsideration of the Commission's finding that Western Wireless's BUS is appropriately classified as CMRS. Rather than providing any new support for their position, however, the Independents simply reiterate the arguments they presented in their Petition for Declaratory Ruling, arguments that were considered and rejected by the Commission in the *Kansas Order*. Nor does the Independents' argument that a portion of the *Kansas Order* is not "by the Commission"<sup>23/</sup> offer any basis for their request for reconsideration. The fact that

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<sup>20/</sup> See *Joint Board Order* ¶ 72.

<sup>21/</sup> See *Universal Service Order* ¶ 145.

<sup>22/</sup> *Joint Board Order* ¶ 72 (citing *Universal Service Order* ¶ 79).

<sup>23/</sup> Petition at 2.

Commissioner Abernathy issued a separate concurrence does not undermine the binding effect of the *Kansas Order*, which held that “BUS is properly classified as CMRS for *two independently sufficient reasons*: (1) it meets the definition of “mobile” service under the statute and the Commission’s rules; and (2) it is ancillary, auxiliary, or incidental to Western Wireless’ provision of traditional cellular service.”<sup>24/</sup> Commissioner Abernathy clearly endorsed the latter rationale.<sup>25/</sup>

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<sup>24/</sup> *Kansas Order* ¶ 15 (emphasis added).

<sup>25/</sup> *See Kansas Order*, Concurring Statement of Commissioner Kathleen Q. Abernathy (“I agree with the majority that the service offering at issue should be regulated as a commercial mobile radio service” because “I believe that the service is ancillary, auxiliary, or incidental to the traditional mobile cellular service provided by Western Wireless”).



## CONCLUSION

For the foregoing reasons, the Commission should deny the Independents' Petition and affirm that state commissions may not subject CMRS providers to equal access obligations as a condition of obtaining ETC status in the state. In addition, the Commission should affirm that Western Wireless's BUS offering is properly classified as CMRS and therefore is not subject to entry, rate, or equal access regulation by the KCC or to federal regulation as a local exchange offering.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Angela Collins, hereby certify that on this 16th day of October 2002, copies of the foregoing Opposition of AT&T Wireless Services, Inc. was sent by first class mail, postage prepaid, to the following:

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